IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04/12/2002

CORAM

THE HONOURABLE MR. JUSTICE V.KANAGARAJ

CRIMINAL APPEAL NO.1234 OF 2001

1. Ravi @ Steel Ravi
2. Roja Venkatesh @ Venkatesh
3. Erandayeeram @ Chinnan
@ Subramani
4. Saravanan .. Appellants

-Vs-

State, rep. by
the Inspector of Police,
Karungalpalayam Police Station,
Erode. .. Respondent

Appeal against the conviction and sentence passed by the learned Additional Sessions Judge, Fast Track Court No.I, Erode in S.C. No.7 of 2001 dated 10.12.2001.

For appellants : Mr.A.V.Somasundaram for
M/s.Lakshmipriya Associates.

For respondent : Mr.A.N.Thambidurai
Govt. Advocate.

:JUDGMENT

This Criminal Appeal is directed against the judgment of conviction and sentence passed by the learned Additional Sessions Judge (Fast Track Court No.1), Erode made in S.C. No.7 of 2001 dated 10.12.2001.

2. The charge against the appellants/convicts No.1 to 4 is that on 19.4.2000 at about 10.30 a.m., appellants/A.1 to A.4, who arrived at the scene of occurrence that is on the South of the Cauveri Bridge between Erode and Pallipalayam in two motor cycles joining hands with each other, threatened and injured P.W.1, Kishore, who after taking bath in the Cauveri river, was coming near the bridge and at the point of knife snatched away a gold chain weighing 1+ sovereigns worn by him and cash of Rs.1,500/= and the Identity Card, which were contained in a bag and thereby appellants/A.1 to A.4 became punishable for the commission of an offence under Section 395 r/w. 397

IPC.

3. During trial, the prosecution in its endeavour to prove its case beyond all reasonable doubts would examine 7 witnesses as P.Ws.1 to 7, besides marking 13 documents as Exs.P.1 to P.13 and 5 material objects as M.Os.1 to 5. On the part of the appellants/accused, they would also examine one K.Karunakaran as the sole defence witness as D. W.1, besides marking three documents as Exs.D.1 to D.3.

4. So far as the witnesses examined on the side of the prosecution are concerned, P.W.1 is the victim Kishore, P.W.2 is his friend Pandian, who is said to have accompanied P.W.1 for a picnic to the spot, P.W.3 is the Doctor attached to the Government Hospital, Erode, who examined P.W.1 medically, P.W.4 is the Village Administrative Officer, P.W.5 is the mahazar witness, P.W.6 is the Head Constable and P.W.7 is the Inspector of Police and the Investigating Officer, both P.Ws.6 and 7 attached to Karungalpalayam Police Station.

5. So far as the documents marked on the prosecution side are concerned, Ex.P.1 is the complaint, Ex.P.2 is Form 95, Ex.P.3 is the accident register, Exs.P.4 to P.6 are the admissible portions of the confession statements of A.1, A.2 and A.3 respectively, Exs.P.7 to P.9 are the seizure mahazars respectively for the recovery of the knife and gold chain, another knife and watch and Suzuki motor cycle, Ex.P.10 is the observation mahazar, Ex.P.11 is the printed F.I.R., Ex.P.12 is the rough sketch and Ex.P.13 is yet another Form 95.

6. Regarding the material objects, M.O.1 is the shirt, M.O.2 is the gold chain, M.O.3 is the knife with the wooden handle, M.O.4 is another knife with mica handle and M.O.5 is the Suzuki motor cycle bearing Registration No.TN 47C 1905.

7. So far as the evidence of D.W.1 is concerned, he is said to have been working as the Librarian in Kandasamy Naidu College, Madras and he would depose to the effect of what are the faculties available in the said college, particularly stating that there is no B.A. English Literature or B.A. History courses offered by the said College.

8. So far as the documentary evidence is concered, Ex.D.1 is the prospectus of the Kandasamy Naidu College for the year 2001-2002, Exs.D.2 and D.3 are the relevant pages of the Diaries of the said College for the year 1998-99 and 2000-2001 respectively.

9. The trial court, in consideration of these evidence placed on record and applying the same to the facts and circumstances of the case of the prosecution, would ultimately arrive at the conclusion holding all the four accused guilty of the offence charged, thus convicting them under Section 395 r/w. 397 IPC and sentencing them each to undergo R.I. for 10 years further imposing a fine of Rs.2,500/= each, in default to undergo a further period of six months R.I. It is only testifying the validity and challenging

the said judgment of the lower court dated 10.12.2002, the appellants/accused 1 to 4 have come forward to prefer the above appeal on grounds as could be seen from the grounds of appeal. In general, the appellants would allege that the trial Court ought not to have relied on the testimony of P.Ws.1 and 2, but it should have attached weightage to the evidence of D.W.1 which reflected on the credibility of P.Ws.1 and 2, who are interested witnesses. Likewise, the appellants would further allege that the Court below ought not to have relied on the evidence of P.W.4, who is a stock witness to the respondent/police and on Exs.P.4 to P.9 in the absence of independent corroboration. The grounds of appeal would also mention about the contradictions among the testimony of P.Ws.1,6 and 7 and Exs.P.1 and P.11 and would question the delay caused in certain documents and material objects reaching the Court. The appellants would Ultimately pray to set aside the conviction and sentence and set them at liberty passing an acquittal judgment allowing the appeal in full.

10. During arguments, the learned counsel appearing on behalf of the appellants, would, at the outset point out that framing of the charge and convicting the appellants for an offence punishable under Sections 395 r/w.397 IPC itself is erroneous and illegal since it is the definite case of the prosecution that only these four appellants indulged in the commission of offence as narrated in the case of the prosecution and without at least five persons joining hands with each other and indulging in such acts of robbery, no trial under Section 395 IPC could be held nor the accused convicted and therefore the conviction and sentence passed against the appellants for the offence punishable under Section 395 r/w. 397 IPC cannot be sustained in law.

11. The next attack of the learned counsel for the appellants is against P.W.4, the Village Administrative Officer and the mahazar witness for the recovery, confession etc. of accused No.1 to 3 as per Exs.P.4 to P.6 on ground that he has already figured as witness in six cases as admitted by

him in his evidence and therefore would submit that the evidence of this witness cannot be relied upon for convicting the appellants which the lower Court has miserably failed to consider in its proper perspective.

12. The learned counsel would then focus his attention on the identification of the accused by the witnesses which had taken place only in the Court hall since no identification parade was held as it is required in law. At this juncture, the learned counsel would cite four judgments as follows:
(i) AIR 1982 SC 948 (BHURE KHAN vs. STATE OF MADHYA PRADESH)
(ii) (1977) 4 SCC 420 (BIR SINGH AND OTHERS vs. STATE OF UTTAR PRADESH)
(iii)(1982) 2 SCC 72 (MANZOOR vs. STATE OF UTTAR PRADESH)
(iv) (1983) 1 SCC 143 (MOHD. ABDUL HAFEEZ vs. STATE OF ANDHRA PRADESH)

13. So far as the first judgment cited above is concerned, it is a case wherein the accused was found in possession of torch and currency notes and since the same was not satisfactorily proved as forming part of corpus delicti and the victim also failed to identify the accused in two identification parades held, the Honourable Apex Court held that the accused is not liable to be convicted under Section 397 IPC.

14. The second judgment cited above is a case of appeal against acquittal wherein the trial Court rejected the prosecution case remarking that the same is based on uncorroborated testimony of interested and partisan witnesses and drawing adverse inference on failure to examine independent witnesses named in the FIR and on appeal the High Court reversed the findings of the trial Court and convicted the accused. On further appeal, the Honourable Apex Court has held that `such a view in the present case was neither manifestly wrong nor perverse nor unreasonable so as to justify reversal of the acquittal by the High Court since possibility of another view was not sufficient and the High Court's opinion was based on conjectures.' It has been further held therein:

"The prosecution, though generally not bound to produce every eyewitness, it must examine all the eye-witnesses when some of them are interested and require corroboration in which event adverse inference on non-examination of independent eye-witnesses mentioned in the FIR has been held justified."

15. In the third judgment cited above, which is also by the Honourable Apex Court, it is held on facts that `where at the earliest opportunity, the eye-witnesses failed to mention any identifying features of the accused persons when they were examined by Investigating Officer, the identification of the accused by one of the witnesses nearly two months later in test identification parade is suspicious.'

16. In the last judgment cited above, the names or description of four accused persons were not given in FIR and no test identification parade was also held and the accused persons were identified only before the Court four months after the occurrence, and in such circumstances, the Honourable Apex Court has held that `such identification is not reliable in connecting the accused with the occurrence.'

17. The learned counsel for the appellants, citing the above judgments would point out that in the case in hand, the complainant identified the accused persons in the Court i.e. after one year after the incident and would cite a judgment of the Honourable Apex Court delivered in MANGILAL & OTHERS vs. STATE OF MADHYA PRADESH reported in 1990 (2) MWN (Cr.) S.C. wherein it has been held:

"Where the evidence of sole eye-witness is not supported by medical evidence as contrary to natural conduct of any similar person, no reliance can be placed on it."

18. Yet another judgment would also be cited by the learned counsel for the appellants is one delivered by the Honourable Apex Court in THE STATE OF U.P. vs. HARI PRASAD AND OTHERS reported in (1974) 3 Supreme Court Cases 673 wherein it has been held:

"It is never incumbent on the prosecution to prove the motive for the crime.

Often times, a motive is indicated to heighten the probability that the offence was committed by the person who was impelled by that motive. But, if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive."

"It is not open to the prosecution to ask the Court to discard the very substratum of their case and to construct a new theory founded on a hypothesis presented for the first time before the Supreme Court."

19. Further pointing out that P.W.1 would mention only three names in his complaint, but there are four accused in the case and there was enormous delay of 12 hours in lodging the Ex.P.1 complaint, the learned counsel for the appellants would cite a judgment of the Honourable Apex Court delivered in RAM JAG AND OTHERS vs. THE STATE OF U.P. reported in (1974) 4 SCC 201 wherein it has been held:

"It is true that witnesses cannot be called upon to explain every hour's delay and a commonsense view has to be taken in ascertaining whether the First Information Report was lodged after an undue delay so as to afford enough scope for manipulating evidence. Whether the delay is so long as to throw a cloud of suspicion on the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay in filing report of an occurrence can be condoned if the witnesses on whose evidence the prosecution relies have no motive for implicating the accused. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness version of the prosecution."

20. The learned counsel for the appellants would also point out that the material objects in this case were not sent to the chemical analysis and would cite a judgment of the Honourable Apex Court delivered in SATYANARAIN vs. STATE OF MADHYA PRADESH reported in 1972 SCC (Cri.) 591. It is a case of murder and the F.I.R. was lodged by a non eye-witness without mentioning the name of the accused and even eyewitnesses are not consistent about the participation of the accused in murdering the deceased, but a lathi without blood stains and some clothes containing washed stains of blood were recovered at the instance of appellant, however, the clothes were not sent for chemical examination and in such circumstances, the Honourable Apex Court held that `where evidence of other witnesses not corroborating eye-witness, the conviction of the appellant cannot be sustained.' On such arguments, the learned counsel for the appellants would pray to allow the above criminal appeal.

21. On the other hand, the learned Government Advocate on the criminal side would point out that regarding the charge, the anomaly that has occurred has not been pleaded before the lower Court for consideration. Regarding the delay in lodging the complaint, the learned Government Advocate on the criminal side would point out that immediately after the occurrence was over, the injured/P.W.1 went to the Hospital and having received medical aid for the injuries sustained by him and after having a discussion with his friends, he along with his friends went to the Karungalpalayam police station and lodged the complaint therein and hence the delay that has occurred in

lodging the Ex. P.1 is quite natural and no manipulation could be attributed for the same.

22. The learned Government Advocate would then submit that when the complainant has very clearly identified the accused by their names and further he himself having suffered in the assault and robbery at the point of knife, the question of conducting the identification parade does not arise at all and therefore the entire argument advanced on the part of the learned counsel for the appellants for the identification parade having not conducted in the case in hand is a waste and irrelevant since no such identification parade became necessary in the circumstances of the case. On such arguments, the learned Government Advocate would ultimately pray to sustain the conviction and sentence as ordered by the Court below.

23. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for the appellant and the learned Government Advocate on the criminal side as well, at the outset it should be admitted that since the accused are only four in number, as maintained by the prosecution right from the beginning till the lower Court delivering the judgment, the question of Section 395 IPC either figuring in the charge or during trial much less for convicting and sentencing the appellants/accused under the said specific penal provision of law, does not arise at all since for an offence of dacoity, as per the definition Section 391 IPC, there must be at least five accused required to have been involved in the offence and therefore Section 395 IPC has absolutely no place to creep in anywhere in the case of the prosecution, which legal flaw the trial Court has miserably failed to note under manifest misconception of law. However, it cannot be said that Section 395 IPC is the only Section under which either the case has been charged or tried and decided since the other Section 397 IPC has also been accompanied by the Section 395 IPC. Hence, so far as the case put-up by the prosecution pertaining to its facts and circumstances is capable of being maintained for the offence punishable under Section 397 IPC alone independently and therefore, though the trial Court has thoughtlessly added Section 395 IPC also, which cannot be done in law, still, it cannot be said that the prosecution does not have a case because of adding of the Section 395 IPC also, therefore, it has become paramount on the part of this Court to find out whether to maintain a conviction and sentence under Section 397 IPC, enough materials have been made available on record by the prosecution in its attempt to prove its case to the extent of the requirements of this Section.

24. P.W.1 is the injured witness, who, in Ex.P.1 itself has very clearly stated not only the identification of each and every one of the four accused, but also their names and therefore at the outset itself, it is for anyone's presumption that there is no ambiguity or confusion in identifying the accused particularly when P.W.2, yet another witness, was also present at the spot. Both these witnesses have not only identified all the accused in the Court but also are definite about as to what happened on the date, time and place of occurrence thus adhering the case put-up on the part of the prosecution. It is a daring robbery indulged in by all the four accused in the open day light when P.Ws.1 and 2 and their friends have gone to

the spot for taking bath in the Cauvery as one of their tour programmes, they being students of a city college at Chennai.

25. Much has been loitered by the defence pertaining to the nonavailability of the English Literature subject in Kandasamy College, Anna Nagar, Chennai whereas Ex.D.1 would bear a different name as Ko. Kandasamy Naidu Men's College, Arignar Anna Nagar, Chennai-102 and it is doubtful whether this is the College that is meant on the part of P.W.1 since there may be many other Colleges more or less in the similar name, which has not been established at the outset on the part of the defence. Even otherwise, this minor issue is not going to deny the occurrence that had taken place on 19.4.2000 at about 10.30 a.m. on the South of the Cauveri Bridge between Erode and Pallipalayam wherein from P.W.1 not only his belongings were robbed by the appellants/accused but also with dangerous weapons have inflicted injuries on P.W.1's person as a result of which the non-availability of the faculty said to have been there is almost irrelevant in consideration whether the prosecution has proved its case beyond reasonable doubts.

26. Besides P.Ws.1 and 2, who were at the spot, the Doctor attached to the Government Hospital, Erode would be examined as P.W.3 and he would adduce evidence satisfactorily to the effect of his examining P.W.1 medically and effecting entries into Ex.P.3 accident register. No motives could be attributed nor any infirmity or inconsistency could be alleged

connecting the evidence of P.W.3 with that of the version of P.Ws.1 and 2 and therefore so far as these witnesses are concerned, the prosecution case should be held well founded.

27. Coming to the evidence of the other witnesses, P.W.4 is the Village Administrative Officer, who, accompanied by P.W.5, would appear as mahazar witnesses and witnesses for the recovery of the knives, gold chain, watch and motor cycle, for the observation mahazar and for the confession statements of A.1 to A.3 separately made and there is no proper or tangible reason for finding or under-estimating the evidence of these witnesses P.Ws.4 and 5 and just for the simple reason that P.W.4 being the Village Administrastive Officer, has already appeared as the mahazar witness in many other cases, his witnessing the events narrated above in the case in hand, cannot be falsified nor discredited and such evidence is only acceptable in the legal parlance. Moreover, his evidence is supported by the evidence of P.W.5 also and therefore, the prosecution case, in no manner, gets either weakened or faded on such accusations made on the part of the defence.

28. The other witnesses - P.Ws.6 and 7 - are the Head Constable and the Inspector of Police and the Investigating Officer respectively. It is P.W.6, who, on receipt of the Ex.P.1 complaint, registered the F.I.R. and sent it expressly to the Court and higher officials further giving intimation to the Investigating Officer about the occurrence on which it is P.W.7, the Inspector of Police and the Investigating Officer, taking up the case for investigation visited the spot and not only prepared Ex.P.10 observation mahazar, Ex.P.12 rough sketch but also under the cover of Ex.P.13-Form 95 recovered the M.Os.1 to 5 and after examining all the

witnesses including the medical witness he laid the charge-sheet before the jurisdictional Magistrate's Court against all the four accused for the offence punishable under Section 395 r/w.397 IPC.

29. As already pointed out, though Section 395 had also been added wrongly, still, the sanctity of the prosecution case under Section 39 7 IPC does not, in any manner, is lost nor even become stale and therefore the only point for consideration in these circumstances is ` whether the prosecution has proved its case for the offence under Section 397 IPC, beyond all reasonable doubts?'

30. All the theft articles including the motor cycle, which the accused used to come to the spot, have been recovered from the accused, which is a major pointer in proof of the case of the prosecution and no major set-back has occurred to the prosecution case in any manner since all the witnesses have spoken to their part played in the prosecution case in a reliable manner, starting from P.W.1 ending with the Investigating Officer-P.W.7. The sole witness examined on the part of the defence in proof of the fact that no English Literature faculty is available in the Kandasamy Naidu College, Chennai, as earlier stated, does not in any manner improve the defence case nor his evidence makes any dent in the structure of the case put-up by the prosecution and therefore easy conclusions could be arrived at to the effect that the prosecution has proved its case to the standard of proof required by law i.e. with proof beyond reasonable doubts so far as the case put-up on the part of the prosecution for an offence under Section 397 IPC committed on the part of the appellants/accused as against P.Ws.1 and 2 and their friends in the manner projected by the prosecution is concerned.

31. The prosecution case has been quite naturally and in a reliable manner proved by such oral, documentary and material evidence without leaving any doubt in the mind of the Court, in the bringing home of the guilt of the accused and there is no laxity or lacuna or inconsistency or infirmity of any kind so as to warrant the interference of this Court into the conviction and sentence ordered by the trial Court which could very well be maintained for an offence proved under Section 397 IPC. In the above circumstances, this Court could only arrive at the conclusion that the prosecution has proved its case beyond all reasonable doubts for the commission of the offence under Section 397 IPC though under Section 395 IPC, no offence could be made out since the accused were only four in number.

In result,
(i)the appeal fails and the same is dismissed;
(ii)The appellants/accused are found guilty of the offence punishable under Section 397 IPC., instead of their conviction for the offence punishable under Section 395 r/w.397 IPC, as passed by the trial Court i.e. the Court of Additional Sessions Judge, Fast Track Court No.I, Erode in S.C. No.7 of 2001 dated 10.12.2001.
(iii)The conviction and sentence of imprisonment and fine under Section 397 IPC as passed by the trial Court is confirmed.

4.12.2002.
Index: Yes
Internet: Yes
Rao

To

1.The Additional Sessions Judge,
Fast Track Court No.I,
Erode.

2.The Public Prosecutor,
High Court, Madras.